Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
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	)	

JOINT REPLY COMMENTS OF CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC, DOMINION ENERGY VIRGINIA AND FLORIDA POWER & LIGHT COMPANY

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EXECUTIVE SUMMARY

CenterPoint Energy Houston Electric, LLC ("CEHE"), Florida Power & Light Company ("FPL"), and Virginia Electric and Power Company d/b/a Dominion Energy Virginia, together, the Pole Owners Working for Equitable Regulation ("POWER") Coalition respectfully submit these reply comments to correct several misconceptions and to oppose several ill-conceived policy proposals found in the initial comments filed in this proceeding.

As an initial matter, the Pole Attachments Act requires that a utility provide pole access, subject at all times to its express unqualified right to deny attachment where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes. With these principles in mind, electric utility pole owners have endeavored for decades to develop pole attachment policies and processes that strike an appropriate balance between the pole access mandates of the statute, and the need to preserve and protect infrastructure that is essential to their primary business of delivering safe and reliable electric power service. To the extent that communications service providers readily follow reasonable pole attachment application instructions, and design their networks in accordance with uniformly applied construction standards, timely access to poles is granted. However, in the great number of cases that attachers fail to conform their installations to the lawful requirements of pole owners, access disputes arise. The members of the POWER Coalition are heartened that the NPRM appears to honor the important safety concerns of utility pole owners, and urge the Commission to consider those concerns in any action taken in this rulemaking.

However, in their initial comments, certain communications service providers press the Commission to expand the scope of the self-help remedies approved in 2011 to address purported delays in the initial phase of the pole access process. Other wireless service providers

falsely claim that construction standards adopted pursuant to state commission regulations, and applied uniformly to all attachers, are tantamount to the sort of "blanket prohibitions" that the Commission disfavors. Still other communications service providers allege that pole owners impose pole attachment application requirements that are too burdensome, and have no valid purpose related to safety, reliability, or engineering. These commenters recommend that the Commission adopt rules to limit the nature and scope of the application requirements that any pole owner may impose.

However, there is little evidence in the record to support any of these assertions. Moreover, the requirements contested are critical to the pole owner's determination of whether any requested attachment would raise concerns of safety, reliability, and engineering. It is the right of the pole owner to deny attachment on these grounds, and therefore, it follows that the pole owner must be allowed to enforce reasonable application requirements that will provide the information needed to make this critical determination. The Commission must disregard the above suggestions, and any other proposed remedies that in effect would deprive the pole owner of its discretion to approve or reject pole access as the statute provides.

Second, the Commission should discard any suggestion to mandate access to dedicated street light poles. The scope of the Pole Attachments Act is clear, and the Eleventh Circuit held 15 years ago that Congress intended to limit the statute's application to local electric distribution facilities, and to exclude from the Commission's regulatory reach all other utility-owned plant not identified in the statute's text. However, despite the long-settled boundaries of the statute, several wireless companies demand that the Commission extend its pole attachment rules to dedicated street light poles that do not comprise the local electric distribution system, are not

used to provide any form of electric service, and are not used for wired communications. These demands are unlawful, and based upon past judicial precedent, must be rejected.

Third, in its initial comments, the POWER Coalition supported the proposed 180-day shot clock for "pole access complaints", narrowly defined to include only complaints that allege "a complete denial of access to utility poles." The rationale is simple: in pole access complaint cases, the *only* meaningful remedy available to the complainant is the timely grant of access to the requested pole. Where new services are delayed to market, or business prospects are lost as the result of unlawful pole access denials, monetary compensation would not make the complainant whole. However, in contrast, complaints alleging unreasonable rates, terms, and conditions do not have similar real-time impacts on business operations, and are resolved in most cases by agreement revisions, and/or damages awards. In short, because the current adjudication process for such complaints does not prejudice or harm either party, the broader rule amendment proposed by some commenters is not warranted.

Fourth, the commission should not modify its current application of the telecom rate for the benefit of incumbent LECs**.** The Pole Attachments Act directs the Commission to develop just and reasonable rates for two separate and distinct classifications of pole attachments: first, any *pole attachment* used by a cable television system solely to provide cable service, and second, any *pole attachment* used to provide telecommunications service. Although the space apportioned to an individual attachment may be varied in accordance with the principles of 47 U.S.C. § 224(e), this does not modify the statute's clear mandate that one charge be assessed per each individual attachment on the pole. If Congress intended instead that pole owners impose a blanket pole license fee, surely the Act would refer to "poles", and not to "attachments."

The ILEC commenters that support an application of Section 224 attachment rates per-pole complain that the alternative approach would *increase* attachment rates for ILECs that transition from their historic joint use agreements. This result is inadvertent, but not anomalous. The Pole Attachments Act was not intended to protect ILECs, or to place any limitation on the rates that any joint infrastructure owner is charged to attach to poles. Rather, its drafters envisioned that cable television service providers would attach no more than one strand to any single utility pole, and in turn, would be charged a fee for such attachment not to exceed the proportionate share of total pole costs associated with the one foot of pole space occupied by its attachment. The abrupt, unlawful decision of the Commission to broaden its jurisdiction under Section 224 generated a conundrum with respect to rates for historic joint use relationships that are not even remotely similar to any of the relationships mandated under the Pole Attachments Act. The Commission must not depart any further from the statute's intended scope at the whim of ILECs demanding to perpetuate joint use benefits, at reduced cost.

Fifth, the Commission should reject out of hand the American Cable Association's "wish list" for master agreements. In its initial comments, the American Cable Association ("ACA") boldly requests that the Commission adopt rules intended to "dictate" critical pole attachment agreement provisions. In particular, the ACA recommends that the Commission approve boilerplate terms and conditions based on various undisclosed submissions to state regulators having no jurisdiction over the members of POWER Coalition; and in turn, grant every communications service provider subject to Section 224 an unconditional right to execute such terms and conditions in lieu of concluding a negotiated agreement with the pole owner. The ACA's proposal would turn agreements under Section 224, and the Commission's current approach to them, on their head, effectively mandating an opt-in tariff approach in lieu of

negotiated agreements. However, in support of its broad master agreement "wish list," the ACA offers nothing more than an unsupported claim that utility pole owners make "unreasonable demands" as conditions to pole access. Absent any record evidence that communications service providers are in effect denied access to poles, or suffer any palpable harms as the result of inequitable terms and conditions of attachment, the Commission should not depart from its current policies favoring negotiated pole attachment agreements.

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CenterPoint Energy Houston Electric, LLC ("CEHE"), Florida Power & Light Company ("FPL"), and Virginia Electric and Power Company d/b/a Dominion Energy Virginia, together, the Pole Owners Working for Equitable Regulation ("POWER") Coalition, through their undersigned counsel, and pursuant to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding,[1] respectfully submit these reply comments. The individual members of the POWER Coalition each are investor-owned electric distribution utilities ("IOUs"), and pole owners within their respective geographic service areas.[2]

I. INTRODUCTION

Interested parties in the proceeding filed approximately 100 sets of comments. The comments came from such varying parties as state and local government entities, wireless telecommunications companies, incumbent local exchange carriers, competitive local exchange carriers, big cable companies, small cable companies and others. The views expressed by all of these parties in their numerous comments represent, as one would expect, a wide-ranging difference of perspectives, interests and goals. Yet, all commenters demonstrated one thing in

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1 *In the Matter of Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment* (WC Docket No. 17-84), Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3260 (Apr. 21, 2017).

2 Complete descriptions of each POWER Coalition member are provided in their Initial Comments in WC Docket No. 17-84, filed on June 15, 2017 ("Initial Comments").

common: access must be provided and maintained in ways that are safe, reliable, follow sound engineering principles and successfully sustain the continued health and growth of the nation's critical infrastructure.

The POWER Coalition asks that, in this rulemaking process, the Commission – as well as all interested parties – keep in mind the parties' common interest in critical infrastructure and the crucial role that electric utilities such as those in the POWER Coalition play in protecting that interest. In many ways, the relevant ecosystem has been working well since 2011 and the Commission should take care not to try and fix what is not broken. Any new rules promulgated, if any, must serve only to balance demonstrated important and legitimate needs of communications carriers against the paramount concerns and role of electric utilities in maintaining the safety, reliability and sound engineering of the critical infrastructure under their watch.

In addition, therefore, to the actions requested in the POWER Coalition's opening comments, the Commission should analyze all comments with great care and thoroughness and be cautious about taking any new measures. In particular, the Commission should first protect the statutory rights of pole owners to ensure the integrity of critical pole infrastructure and not authorize self-help remedies for initial pole access or prohibit either reasonable construction standards or application procedures that protect the safety, reliability and engineering standards necessary for pole owners. In the same vein, the Commission should not change its policies on overlashing, which have worked reasonably well to the benefit of all for nearly 20 years. Second, the Commission cannot and should not mandate access to dedicated street light poles because they are not subject to either to the same jurisdiction or standards and practices as distribution infrastructure used for wired communications. Third, the Commission must reject both the 180-day shot clock for rate complaints (and all complaints other than for access) and the shifting of the

burden of proof to electric utility pole owners as unworkable, unlawful and/or a recipe for a failed system. Fourth, the Commission should not modify its current application of the "new telecom rate" to benefit ILECs, which continue to use their unique situation to advantage themselves over CLECs by seeking tortured applications of a statutory rate provision that was never meant for ILECs. Finally, the Commission should deny the American Cable Association's request to flip a longstanding and well-developed system preferring negotiated agreements into an opt-in, one-size-fits-all tariff system.

II. THE COMMISSION MUST GIVE FULL EFFECT TO THE RIGHTS OF POLE OWNERS TO PRESERVE AND PROTECT CRITICAL INFRASTRUCTURE.

The Pole Attachments Act requires that a utility provide pole access, subject at all times to its express unqualified right to deny attachment where there is insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes.[3] With these principles in mind, electric utility pole owners have endeavored for decades to develop pole attachment policies and processes that strike an appropriate balance between the pole access mandates of the statute, and the need to preserve and protect infrastructure that is essential to their primary business of delivering safe and reliable electric power service. To the extent that communications service providers readily follow reasonable pole attachment application instructions, and design their networks in accordance with uniformly applied construction standards, timely access to poles is granted. However, in the great number of cases that attachers fail to conform their installations to the lawful requirements of pole owners, access disputes arise. The members of the POWER Coalition are heartened that the NPRM appears to honor the important safety concerns of utility pole owners, and urge the Commission to consider those concerns in any action taken in this rulemaking.

[3] 47 U.S.C. § 224(f).

A. The Statute Does Not Authorize Self-Help Remedies for Initial Pole Access Requests.

In their initial comments, certain communications service providers press the Commission to expand the scope of the self-help remedies approved in 2011 to address purported delays in the initial phase of the pole access process. For one, ExteNet Systems recommends a "deemed granted" approach, that in effect would cause any attachment application not processed within the applicable Commission-ordered time period to be accorded an immediate, affirmative approval.[4] Similarly, Lumos Networks proposes that the pole owner's authorized third-party contractor be permitted, at the request of any new attacher, to approve an attachment application on the pole owner's behalf at such time as the Commission-ordered deadline expires.[5] In either case, the right *of the electric utility pole owner* to deny pole access under the statute is violated.[6] Moreover, the proposals run afoul of various state regulations that require IOUs to develop *and execute* construction standards, policies, practices, and procedures that ensure the delivery of safe and reliable electric power service.[7]

The statute provides a clear exception to its pole access requirements: "***a utility providing electric service*** may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or right-of-way where there is insufficient capacity, and for reasons of safety, reliability, and generally applicable engineering principles.[8] Importantly, the plain language of Section 224(f)(2) confirms that the electric utility pole owner's right to deny pole access is absolutely the pole owner's, and cannot be vested in another party at the Commission's direction. The Commission has no discretion to interpret the statute where its language is express and

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4 Initial Comments of ExteNet Systems, Inc. at 52 ("ExteNet Systems").
5 Initial Comments of Lumos Networks Inc. Lumos Networks of West Virginia Inc., and Lumos Networks LLC at 6 ("Lumos").
6 47 U.S.C. § 224(f)(2).
7 *See, e.g.*, Fla. Admin. Code Ann. r. 25-6.0342(5).
8 *Id*. (emphasis added)

unambiguous.[9] Unlike the self-help remedies available under the current rules to expedite construction of an approved attachment,[10] the proposed new remedies would terminate, and then transfer the right of an electric utility pole owner to render any decision on an application to attach to its pole after the required forty-five (45) day time period has lapsed. Furthermore, neither of the proposed self-help remedies account for the likelihood that the new attacher, or an existing attacher – and *not* the pole owner – is the cause of the delay.[11] The Commission must discard these, and other proposed remedies that in effect would deprive the pole owner of its statutory right to approve or reject pole access.

B. The Commission Must Not Prohibit Reasonable Construction Standards that Serve the Safety, Reliability, and Engineering Requirements of Pole Owners.

In their initial comments, certain wireless service providers falsely claim that construction standards adopted pursuant to state commission regulations, and applied uniformly to all attachers, are tantamount to the sort of "blanket prohibitions" that the Commission disfavors.[12] In particular, Crown Castle identifies as *de facto* denials of access (among other construction standards) certain vertical clearance requirements, and pole loading restrictions.[13] Such conditions to pole access are narrowly devised to serve critical safety, reliability and engineering functions of the electric utility pole owner, and therefore, must be deemed reasonable for purposes of the Pole Attachments Act. Moreover, commenters demonstrate at best that the construction standards complained of result in no more than minor inconveniences to attachers, all of which are outweighed by important public benefits.

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9 *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Negusie v. Holder*, 555 U.S. 511, 523 (2009).

10 47 C.F.R. § 1.1420(c).

11 Initial Comments at 7-9.

12 Initial Comments of Crown Castle International Corp. at 5 ("Crown Castle"); ExteNet Systems at 55. *See also In the Matter of Implementation of Section 224 of the Act*, Report & Order and Order on Reconsideration, WC Docket No. 07-245, FCC 11-50, 26 FCC Rcd. 5240, ¶ 77 (Apr. 7, 2011)("2011 Telecom Order").

13 *See* Crown Castle 4-10.

The specific construction standards described in the initial comments of Crown Castle do not "ban" any form of communications device,[14] or any attachment practice or technique.[15] Rather, it is the intention of such construction standards to guide communications service providers in developing attachment specifications that *will* meet the safety, reliability, and engineering criteria for common classes of electric distribution poles. To the extent that an application for attachment is consistent with all applicable construction standards, it is more likely both that the application will be granted, and that electric utility pole owner will fully process the application within the time period that the Commission's rule requires.[16] Furthermore, such construction standards do not impose any excess or prohibitive costs on communications service providers,[17] and in most cases, attachers are offered options of attachment design modifications and/or make-ready that enable cost conscious decisions to be made. In the case of each POWER Coalition member, construction standards are uniformly applied to all communications service providers subject to Section 224, as well as the pole owner, and any other party granted access to the pole. As discussed in the subsections that follow, specific practices described in the initial comments of Crown Castle do in fact serve safety, reliability and engineering functions of the electric utility pole owner.

In addition to misbranding both the purpose and intent of all company-specific construction standards, Crown Castle further implores the Commission to presume that even the smallest of

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[14] The Commission's statements in the 2011 Pole Attachment Order relate to the practice of *disallowing* all wireless pole top attachments. *See* 2011 Pole Attachment Order at ¶ 77. In contrast, the construction standards referred to in the initial comments of Crown Castle and others do not *disallow* any attachment. At bottom, nothing in the statute precludes conditions of access related to safety, reliability, and engineering.

[15] Crown Castle at 4-10.

[16] Conversely, applications that do not conform to the electric utility pole owner's construction standards are more likely to raise safety, reliability, and engineering concerns that cause the application to be denied, or alternatively, subject to extensive review in an effort to mitigate such concerns.

[17] Most construction standards are satisfied with limited revisions to an attacher's design template. As discussed more fully below, in the case of devices that emit RF, poles often must be replaced to create a safe "approach distance" for communications workers on the pole. However, members of the POWER Coalition each as a matter of practice replace certain poles to accommodate access requests under Section 224.

deviations in excess of the NESC's requirements are unreasonable, in violation of Section 224.[18] Even if Crown Castle demonstrated that to be accurate (and it has not), it does not follow that the NESC is an appropriate default standard for *all* IOUs, wherever located. In fact, under the various laws of the states in which POWER Coalition members operate,[19] the NESC represents the absolute minimal standards pursuant to which IOUs must install, maintain, and operate electric distribution plant.[20] For example, the state commissions of both Florida and Texas each require that IOUs develop, and periodically update storm hardening plans that anticipate construction standards exceeding the NESC, as needed to enhance reliability, and reduce outages during storms.[21] The Florida Administrative Code, in particular, requires that such standards also be imposed on all third party attachments:

> Attachment Standards and Procedures: As part of its storm hardening plan, each utility shall maintain written safety, reliability, pole loading capacity, and engineering standards and procedures for attachments by others to the electric utility's electric transmission and distribution poles (Attachment Standards and Procedures). The Attachment Standards and Procedures **shall meet or exceed** the edition of the National Electric Safety Code (ANSI C-2) that is applicable pursuant to Rule 25-6.034, F.A.C. so as to assure, as far as is reasonably practicable, that third party facilities attached to electric transmission and distribution poles do not impair electric safety, adequacy, or pole reliability; do not exceed pole loading capacity; and are constructed, installed maintained and operated in accordance with generally accepted engineering practices for the utility's service territory.[22]

Thus, if the Commission were to impose NESC standards as the *maximum* construction standards allowable for attachments subject to Section 224, IOUs would then be violation of their obligations under state law to adequately safeguard their infrastructure.

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18 Crown Castle at 10.

19 The members of the POWER Coalition operate in Florida (FPL), North Carolina (Dominion Energy North Carolina), Texas (CEHE), and Virginia (Dominion Energy Virginia).

20 *See* Fla. Admin. Code Ann. §25-6.0342(5); Tx. Admin. Code Ann. §25.101(d); 4 N.C. Admin. Code 11.R8-26.

21 *See* Fla. Admin. Code Ann. §25-6.0342; Tx. Admin. Code Ann. §25.95.

22 Fla. Admin. Code Ann. §25-6.0342(5).

The Commission would then, in turn, be in violation of federal law. The Supremacy Clause of the United States Constitution provides federal law preemption of state law where federal law occupies the field and expressly preempts state law or where application of state law would necessarily conflict with state law.[23] Neither is the case with state law prescribing standards for the safety, engineering and reliability of intrastate electric utility infrastructure.

Section 224 specifically recognizes that the FCC has no jurisdiction over the right of an electric utility to deny access for issues of insufficient capacity, safety, engineering or reliability "where such matters are regulated by a State."[24] While a state must sufficiently certify to the Commission when it regulates the "rates, terms, and conditions" of pole attachments, the statute conspicuously omits any such certification for state regulation of safety, engineering and reliability concerns.[25] Therefore, where states such as Florida specify particular safety, engineering and reliability standards for electric utilities, not only does the Pole Attachments Act not preempt state law expressly or by conflict, it specifically preserves the rights of the state to regulate the safety, health, and welfare concerns arising from intrastate infrastructure. Indeed, the United States Supreme Court made clear that Congress did not intend to supplant inherent state authority over, but only for the FCC "to fill the gap left by state systems of public utilities."[26]

i. Vertical Clearance Requirements.

The initial comments of Crown Castle question whether vertical clearance requirements in excess of the NESC's requirements for attachments above the electrical lines are just and

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[23] *See e.g., Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 604 (1991); *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995); *Aux Sable Liquid Products v. Murphy,* 526 F.3d 1028, 1033 (7th Cir.2008); *Hoagland v. Town of Clear Lake,* 415 F.3d 693, 696 (7th Cir. 2005); *Western Air Lines, Inc. v. Port Auth.,* 817 F.2d 222, 225-26 (2d Cir. 1987).

[24] 47 U.S.C. § 224(c)(1).

[25] 47 U.S.C. § 224(c)(2).

[26] *F.C.C. v. Florida Power Corp.,* 480 U.S. 245, 247–48 (1987).

reasonable.[27] In support of its claim that such clearance requirements be limited only to standards established in the NESC, Crown Castle references provisions that appear to require no more than two feet between the highest electric line, and any pole top attachment.[28] However, these standards do not account for the hazard caused by the attachment itself: RF emissions.[29] Indeed, the added vertical clearance that many electric utility pole owners, and that all POWER Coalition members require is based on the requirements of OSHA[30] and the Commission's own guidelines that address the biological effects of RF emissions.[31]

Because RF-emitting wireless pole attachments operate in an uncontrolled environment,[32] the pole owner must ensure that workers both in the Supply Space, and in the Communications Space, as well as proximate to the pole (for example, vegetation management workers) are not exposed to RF beyond the Maximum Permissible Exposure ("MPE") limits, calculated in accordance with OET Bulletin 65.[33] The vertical clearance required by each POWER Coalition member is calculated based on the approach distance for approved wireless devices on its poles.[34] It is entirely reasonable to require that an RF-emitting device be installed at least at what is considered a safe distance from any individual who might be unaware of its presence. Even if a

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27 Crown Castle at 7.

28 *Id*.

29 *See Id* (citing Institute of Electrical and Electronics Engineers, Inc., Nat'l Electric Safety Code, Rule 235I, Table 235-6 Ln. 1.c. (2017 Edition)).

30 *See* 29 C.F.R § 1910.268.

31 *See Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, FCC Office of Engineering & Technology, OET Bulletin 65, Edition 97-01 (2001) *available at* https://transition.fcc.gov/bureaus/oet/info/documents/bulletins/oet65/oet65c.pdf ("OET Bulletin").

32 An "uncontrolled environment" is one in which persons who are exposed as a consequence of their employment may not be fully aware of the potential for exposure or cannot exercise control over their exposure. OET Bulletin at 15.

33 OET Bulletin at 15.

34 Crown Castle notes that no IOU requires vertical clearance that is three times the distance recommended by the device manufacturer. However, the recommendation of the manufacturer should be dispositive with respect to pole safety.

"cut-off" switch is provided, the pole owner can be certain only that its own workers are trained in managing the RF risk.[35]

ii. Placement of Electric Metering Equipment.

The initial comments of Crown Castle also question whether any construction standard that prohibits specific uses of the "common space" (below clearance level) is just and reasonable.[36] As an initial matter, such comments refer to equipment that is not used to provide telecommunications service, and in fact, is used only in relation to electric power service at the attachment site.[37] As retail electric customers, all Section 224 attachers are subject by state law to the same terms, practices and procedures that the electric utility pole owner applies to all other retail electric customers.[38] In this context, it is in the sole discretion of the electric utility pole owner, in accordance with state law, to develop standards for the installation of electric power meters, and such standards must be uniformly applied across the electric utility's customer base.[39] Because state law prohibits the electric utility pole owner cannot from adopting modified construction standards for a select base of retail electric customers, the Commission cannot and should not impose rules that govern the installation of electric service equipment.

Once again, Crown Castle incorrectly assumes that the NESC is the governing standard for all electric utility construction, and that no deviation from the NESC is reasonable, or is permitted under Section 224.[40] However, in the cases of both CEHE and FPL, state commission regulations dictate the precise location in which electrical equipment is placed. For example, because Florida's storm hardening rule expressly promotes the hardening of electric utility infrastructure

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35 *See* Crown Castle at 7. The members of POWER Coalition do not train or supervise workers in the Communications Space, or outside contractors that perform vegetation trimming.

36 Crown Castle at 5.

37 The POWER Coalition understands "ancillary equipment" to mean electric power meters, and any "cut-off" switch used to de-energize the attachment.

38 *See e.g.*, Va. Code § 56-578.

39 *Id.*

40 Crown Castle 5-6.

against storm threats, it is FPL's uniform practice to require that all non-essential electric utility equipment, such as electric power meters, are placed on the ground.[41] Similarly, CEHE is bound by its Tariff for Retail Delivery Service, as filed with the Texas PUC, which prescribes criteria for all locations at which electric power meters are installed.[42] CEHE has determined, for *all* of its electric customers that distribution poles do not meet these criteria.

C. The Commission Must Not Prohibit Reasonable Application Procedures that Serve the Safety, Reliability, and Engineering Requirements of Pole Owners.

In their initial comments, several communications service providers recommend that the Commission adopt rules to limit the nature and scope of the application requirements that any pole owner may impose, alleging that pole owners impose pole attachment application requirements that are burdensome, and have no valid purpose related to safety, reliability, or engineering.[43] Yet, the contested requirements are designed precisely to facilitate the pole owner's determination of whether any requested attachment would raise concerns of safety, reliability, and engineering. It is the right of the pole owner to deny attachment on these grounds, and therefore, it follows that the pole owner must be allowed to enforce reasonable application requirements that will provide the information needed to make critical determinations. The POWER Coalition describes below the application requirements identified in initial comments, the function of such requirements, and their minimal burden on attachers.

i. Pre-Application Approval of New Wireless Devices.

In their initial comments, several communications service providers express discontent that pole owners impose allegedly burdensome pre-application requirements which have the effect of extending the Commission-ordered deadlines for pole access. The members of the POWER

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41 Fla. Admin. Code Ann. §25-6.0342(a).

42 CenterPoint Energy Houston Electric, LLC, Tariff for Retail Delivery Service at § 5.10.4 (Jan. 15, 2015).

43 *See e.g.*, Initial Comments of NCTA – the Internet and Televisions Association at 4; Initial Comments of Charter Communications, Inc. at 35-7.

Coalition do not impose any form of pre-application requirements, and are not familiar with the processes described in the comments of Crown Castle and others.[44] However, consistent with the guidance provided in 2011 Pole Attachment Order, each POWER Coalition member does require a one-time engineering evaluation of all untested wireless equipment before any application to attach such equipment will be reviewed.[45] As the Commission aptly recognized in 2011, the novelty of all wireless equipment may pose additional complications in developing appropriate specifications, and may raise unique issues of safety, security and engineering.[46] Given the rapid pace at which wireless equipment is continuing to develop, the same rationale applies today. Therefore, the Commission must maintain its flexible approach with respect to evaluating new wireless equipment.

The POWER Coalition members each execute their evaluations of new wireless equipment on commercially reasonable terms, and within commercially reasonable time frames, as the 2011 Pole Attachment Order requires.[47] These processes are efficient, and once approved, an attachment design may be used on poles throughout the pole owner's service area. Moreover, as a time-saving measure, each member of the POWER Coalition routinely will begin the evaluation process even as pole attachment agreement negotiations are ongoing. In the case of FPL, evaluations generally are completed within 45 days.[48] The POWER Coalition members do not require any application or fee for wireless device evaluations, even though they could rightly insist on adherence to such requirements.

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44 Crown Castle at 10-13.
45 *See* 2011 Pole Attachment Order at ¶ 44.
46 *Id*.
47 *Id*.
48 All POWER Coalition members report that initial device evaluations are routinely completed even before the first application to attach is submitted.

ii. RF Evaluations.

Among the complexities associated with wireless service attachments, the most fearsome is perhaps the emission of RF waves. Whether placed in the Communications Space, or at the pole top, it is imperative that an electric utility pole owner is able to ensure adequate protection against RF emissions for its own linemen. This inures to the benefit of the pole owner's contractors, as well as the contractors of communications attachers on the pole. To ensure that individuals on, or proximate to the pole are properly warned of RF hazards, the electric utility pole owner must know the precise RF emitting properties of all wireless devices installed on its pole, and must be able to evaluate whether a requested attachment is safe under the conditions on specific poles. The results of RF studies are used to determine the safe approach distance for wireless attachments, which in turn is used to develop worker protocols, and to post appropriate warnings. For members of the POWER Coalition, each application to attach an RF-emitting device must include the report of a qualified engineer addressing compliance with the FCC's guidelines for RF, and recommended safety measures.

The RF evaluations required by members of the POWER Coalition are of minimal cost and burden to the attacher. Because the attacher is accorded full discretion to select its RF consultant, the attacher generally is able to control the cost, quality, and timing of the evaluation process. In fact, the RF evaluation may precede an attachment application by months, if the attacher so desires. Moreover, because an RF evaluation is device specific, and not attachment specific, it may be re-submitted for each individual attachment application in which the same device specifications are used.

iii. Pole Loading Analyses.

To maintain safe and reliable electric distribution infrastructure, it is critical that poles do not become overloaded by new attachments or by overlashed cables. If capacity is added to poles without proper evaluation, wear and tear on the pole will increase, as will the likelihood of damage that necessitates replacement of the pole. Therefore, the small cost that an attacher incurs to perform a pole loading analysis at the time of its attachment application certainly is outweighed by the future benefit. Even where physical space appears to be available on any requested pole, a complete pole loading analysis may be required to determine whether the added burden of an attachment (or of an overlash) would be too great for the pole. The Commission must not deny pole owners the use of this essential means of ensuring that all poles are properly engineered.

As discussed more fully in the initial comments of the POWER Coalition, a complete pole loading analysis may be required pursuant to some state regulations on storm hardening.[49] In the case of FPL, for example, it would violate Florida state law *not* to perform a pole loading analysis for each requested attachment, on each pole.[50] Although CEHE may be accorded greater discretion under Texas law, CEHE also routinely performs pole loading analyses pursuant to its commission- approved storm hardening plan. This requirement is perhaps applied more sparingly, however, in non-urban areas, or in areas that are not storm zones.[51] At bottom, the various practices of POWER Coalition members certainly provide no indication that pole loading analyses are overused, or that requirements are intended to burden or delay attachment.

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49 Initial Comments at 5-6.

50 *Id*.

51 CEHE and Dominion Virginia Energy each report that no pole loading analysis is required if visual inspection of the request pole indicates no particular loading concerns, and no external loading considerations exist.

D. The Commission Should Not Relax its Current Policies on Overlashing.

In their initial comments, both NCTA and ACA demand that the Commission adopt rules that would require in all cases streamlined review processes for overlashed attachments.[52] NCTA, in particular, goes so far as to recommend that electric utility pole owners be banned from imposing any form of pole loading evaluation for modifications to existing attachments – some of which go way beyond "overlashing" as the Commission defined it.[53] The POWER Coalition supports, and urges the Commission to maintain its current policies on overlashing, which strike the proper balance between the need of the attacher for expedited pole access, and the duty of the pole owner to ensure that all capacity added to its pole is safe, and precisely engineered. To that end, three key rights of the pole owner articulated in the 2001 Consolidated Order must be reaffirmed: (i) the right of the pole owner to deny overlashing subject to the same safety, reliability and engineering criteria applied to attachments; (ii) the right to require notice; and (iii) the right to assess the burden on the pole, and to require make-ready, as needed.[54]

As an important threshold matter, the Commission must reiterate its current definition of "overlashing"; the practice whereby a service provider physically ties its wiring to other wiring already secured to the pole.[55] The overlashing policies adopted by the Commission first for cable service providers, and then in 1998, for telecommunications service providers are applicable only to the practice described, and have never been expanded. However, contrary to the Commission's clear guidance, the comments of NCTA appear to suggest that "advanced electronics" mounted on

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52 ACA at 9-10, 30-31; NCTA at 5-7.

53 *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report & Order, FCC 98-20, ¶ 59 (Feb. 6, 1998), *aff'd sub nom National Cable & Telecommunications Assn., Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) ("1998 Telecom Order").

54 *In re Amendment of Commission's Rules & Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, CS Docket No. 97-151, FCC 01-170, 16 F.C.C. Rcd. 12103, ¶¶ 73-86 (2001)("2001 Consolidated Order").

55 1998 Telecom Order ¶ 59.

an existing strand also meets the definition of overlashing.[56] They do not. The so-called "advanced devices" presented for "overlashing" to members of the POWER Coalition often emit RF, and in some cases, exceed sixty pounds in weight. Surely, the Commission did not intend for its policies developed in 1998 to be applicable to devices of this size or sophistication.

As indicated above, the 2001 Consolidated Order clarified three essential rights of the pole owner with respect to overlashing: (i) the right of the pole owner to deny overlashing, subject to the same safety, reliability and engineering criteria applied to attachments;[57] (ii) the right to require notice of overlashing;[58] and (iii) the right of the pole owner to assess the burden on the pole, and to require make-ready (or pole replacements), as needed to support overlashing.[59] Importantly, certain of these rights would be rendered meaningless if the Commission did as NCTA recommends, and banned the common practice of pole loading studies for overlashed attachments. Indeed, it would be impossible to determine the "burden" on the pole for purposes of any make-ready assessment, or to determine the safety, reliability, and engineering impact of added capacity if such requirements were in all cases disallowed. Therefore, the Commission should reject NCTA's proposed changes to its overlashing policies.

III. THE COMMISSION LACKS JURISDICTION TO MANDATE ACCESS TO DEDICATED STREET LIGHT POLES.

The scope of the Pole Attachments Act is clear: the Eleventh Circuit in *Southern Co.* rightly held that Congress intended to limit the statute's application to local electric distribution facilities, and to exclude from the Commission's regulatory reach all other utility-owned plant not identified in the statute's text.[60] However, despite the well-settled boundaries of Section 224,

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56 NCTA at 6.
57 2001 Consolidated Order ¶ 73.
58 *Id*. ¶ 82
59 *Id*. ¶ 77.
60 *Southern Co. et al. v. FCC*, 293 F.3d 1338, 1343 (11th Cir. 2002).

several wireless companies demand that the Commission extend its pole attachment rules to dedicated street light poles that *do not* comprise part of the local electric distribution system, *are not* used to provide any form of electric service, and *are not* used for wired communications.[61] These demands are unlawful, and based on the Court's decision in *Southern Co.*, must be rejected.

The members of the POWER Coalition each construct and maintain certain poles used *only* to support street lights. Such poles differ in critical respects from electric distribution poles subject to the access mandates of Section 224. First, because dedicated street light poles are not engineered to support lateral cables, such poles are not the equivalent of electric distribution poles in terms of size, strength, or capacity. In other words, access to any pole of this character would, in all cases, be denied under 47 U.S.C. § 224(f)(2), for reasons of safety, engineering, and insufficient capacity. Second, but perhaps more importantly, dedicated street light poles are not covered under the same body of state regulations as utility infrastructure used for power generation and local distribution.[62] In fact, dedicated street light poles have no function related to electric utility operations at all.[63]

For POWER Coalition members, all dedicated street light poles are constructed, operated, maintained, and retired pursuant to private agreements between the utility pole owner and various third parties, including counties, municipalities, private subdivisions, and individual real property owners. All such poles are set in rights-of way or easements dedicated to specific projects, and all such poles exist at the convenience, and for the sole benefit of the party that commissioned them.

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61 In contrast, Dominion Energy Virginia provides access under Section 224 to certain of its electric distribution poles that, incident to their primary function, also support street lights. However, the other POWER Coalition members do not maintain such multi-function poles in their respective pole inventory.

62 *In Southern Co*., the Court found dispositive that transmission infrastructure, being under the jurisdiction of FERC, could not be among the local electric distribution facilities that Congress intended for the Commission to regulate under the Pole Attachments Act. *Id*. at 1344.

63 In *Southern Co*., the Court identified three principal systems that comprise electric utility operations: production, transmission, and distribution. *Id*. at 1343. The dedicated street light poles referred to in initial comments are not part of any of these systems.

In practice, the pole owner's control over dedicated street light poles is limited, and subject at all times to negotiated terms. Therefore, any new pole access requirement that the Commission may impose would violate the rights, and frustrate the reasonable expectations of parties that contracted for custom-constructed special use poles.

Of further significance, the members of the POWER Coalition, like all IOUs, each book dedicated street light poles in accounts separate from local electric distribution plant for FERC reporting purposes.[64] In the case of FPL, the value of certain dedicated street light poles also is allocated to just the select base of ratepayers who benefit directly from their service.[65] If the Commission, at any point in the now 40-year history of the Pole Attachments Act, determined dedicated street light poles to be part of the universe of poles to which access must be provided under Section 224, surely it would have incorporated these separate FERC accounts into its pole attachment rate formulas.[66] However, and perhaps tellingly, the current rules would not even enable utility pole owners to recover those costs associated with providing access to dedicated street light poles. That street light poles are booked in separate FERC accounts also indicates that they are not distribution poles subject to Section 224.

IV. THE COMMISSION MUST NOT ADOPT THE PROPOSED 180-DAY SHOT CLOCK FOR RATE-RELATED COMPLAINTS.

In its initial comments, the POWER Coalition supported the proposed 180-day shot clock for "pole access complaints", narrowly defined to include only complaints that allege "a complete denial of access to utility poles".[67] The rationale is simple: in pole access complaint cases, the *only*

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64 Street light poles are booked to FERC account 373, whereas electric distribution poles are booked to FERC account 364.

65 *See e.g.*, FPL installs more than 150 state-of-the-art streetlights to help brighten West Palm Beach, save residents money and provide environmental benefits, (Dec. 2, 2013) available at http://newsroom.fpl.com/2013-12-02-FPL-installs-more-than-150-state-of-the-art-streetlights-to-help-brighten-West-Palm-Beach-save-residents-money-and-provide-environmental-benefits.

66 *See* 47 C.F.R. § 1.1409(d)-(e).

67 *See* NPRM at ¶¶ 47-51; Initial Comments at 38.

meaningful remedy available to the complainant is the timely grant of access to the requested pole. Where new services are delayed to market, or business prospects are lost as the result of unlawful pole access denials, monetary compensation would not make the complainant whole.[68] In contrast, complaints alleging unreasonable rates, terms, and conditions do not have similar real-time impacts on business operations, and are resolved in most cases by agreement revisions, and/or damages awards.[69] In short, because the current adjudication process for such complaints does not prejudice or harm either party,[70] the broader rule amendment proposed by some commenters is not warranted.

It is no surprise that incumbent LECs unanimously invited the Commission to expand its NPRM proposal to encompass rate complaints, in addition to pole access complaints.[71] Since 2011, the Enforcement Bureau has been mired in incumbent LEC complaints, each demanding to nullify bargained-for joint use rates.[72] Now that the Commission proposes to fully relieve ILECs (but not CLECs or cable entities) of the burden to demonstrate the "unreasonableness" of joint use rates, it certainly makes sense from an incumbent LEC's vantage point that the Commission expedite its review process for rate complaints. However, such application of the proposed 180-day shot clock is prohibitively prejudicial to electric utility pole owners, and must be rejected – if

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68 Further, under the current rules, the Commission only is authorized to order pole access within a specified time frame, and subject to specified rates, terms and conditions. *See* 47 C.F.R. § 1.1410(b).

69 *See* 47 C.F.R. § 1.1410(a).

70 FPL has indicated that the pace of the complaint process results in business uncertainty.

71 *See e.g.*, Initial Comments of AT&T Services, Inc. 25-26; Initial Comments of Frontier Communications Corporation 14-15; Initial Comments of Verizon 15-16.

72 *See e.g.*, Verizon Virginia LLC and Verizon South Inc. Pole Attachment Complaint, Docket No.15-190 (Aug. 3, 2015)("Verizon Virginia and Verizon South Complaint"); Verizon Florida LLC Pole Attachment Complaint, Docket No. 15-73, File No. EB-15-MD-002 (Mar. 13, 2015)("Verizon Florida Complaint"); Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company and CTSI, LLC d/b/a Frontier Communications CTSI Company Pole Attachment Complaint, Docket No. 14-217, File No. EB-14-MD-007 (May 14, 2014); Frontier Communications of the Carolinas, LLC Pole Attachment Complaint, Docket No. 14-213, File No. EB-13-MD-007 (Dec. 9, 2013).

not in all cases, then certainly in cases where the respondent pole owner must demonstrate by clear and convincing evidence that negotiated joint use rates are just and reasonable.[73]

Even under the current rule, the burden on the respondent to *defend* the reasonableness of any pole attachment rate is substantial. Unlike the complainant, an electric utility pole owner that is subject to a rate complaint does not enjoy the benefit of unlimited time to develop its case prior to the time it chooses to file. Further, whereas the current rule provides the respondent thirty (30) days to respond to all pole attachment complaints,[74] in practice, no less than ninety (90) days is sufficient to compile the comprehensive response that the rule demands.[75] In particular, this response generally must include statements of the respondent's legal positions, fact declarations, expert witness declarations, calculations, and all inputs, and supporting data.[76] In most cases, discovery also is needed to complete the record before the Enforcement Bureau.[77] If the Commission proceeds to shift the burden of proof in certain pole attachment rate cases from complainant to respondent (and it should not do so), the consequence would be that the process favors the party with the *lesser* burden of proof, and in all cases, disfavors the electric utility pole owner. In such cases, the prejudice to electric utility pole owners would be amplified by the compressed 180-day shot clock that certain commenters support. Indeed, if the burden of proof is

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73 *See* NPRM, ¶ 45. The POWER Coalition already demonstrated to the Commission in its Initial Comments the many reasons that the proposed process for ILEC-initiated rate complaints in unlawful. Initial Comments at 27. As further explained in these Reply Comments, if coupled with a fixed 180-day review period, such process all but ensures that no negotiated joint use rate will be honored.

74 47 C.F.R § 1.1407(a).

75 *See e.g., Verizon Virginia LLC and Verizon South Inc. v. Virginia Electric and Power Company d/b/a Dominion Virginia Power*, Docket No.15-190, File No. EB-15-MD-006 (Aug. 18, 2015)(letter from Enforcement Bureau granting an extension of time in which to file a Response brief and Reply brief); *Verizon Florida LLC v. Florida Power and Light Company*, Docket No. 15-73, File No. EB-15-MD-002 (Apr. 15, 2015)(Joint Proposed Procedural Schedule allowing discovery and extensions of time to file briefs).

76 *See* 47 C.F.R § 1.1407(a).

77 *See e.g., Verizon Virginia LLC and Verizon South Inc. v. Virginia Electric and Power Company d/b/a Dominion Virginia Power*, Docket No.15-190, File No. EB-15-MD-006 (Dec. 15, 2015)(Enforcement Bureau's approval of request by Complainant ILEC for the Production of Document from Respondent Utility); *Frontier Communications of the Carolina, LLC v. Duke Energy Progress Inc.*, Docket No. 14-213, File No. EB 14-213 (Feb. 13, 2015)(letter from the Enforcement Bureau requiring additional briefing and allowing discovery).

on the pole owner, then it should have the right as the party bearing that burden to file the first brief or make the opening argument, and then file the closing brief or make the closing argument after the attacher's filing, just like the applicable process for the party bearing the burden of proof in virtually every other civil or administrative proceeding in the American legal system.

In the alternative, if the Commission is inclined to impose any firm time limitation on rate complaint proceedings, the so-called "shot clock" must not run until the record is complete, taking into account reasonable extension requests, and discovery, as applicable.[78] First and foremost, the parties to any pole attachment complaint proceeding must not be denied their respective rights to fully prosecute or defend the complaint. Moreover, the record of pole attachment complaint cases since 2011 reveals that the Enforcement Bureau's review and consideration of the complaint is the most significant source of delay. For example, in *Verizon Virginia et al*., the complaint, response, and reply all were filed, and discovery concluded within a five month-period.[79] However, a total of fifteen months passed between the date on which Verizon filed its reply, and the date on which the Enforcement Bureau issued an *interim* order, which still did not resolve the parties' rate dispute.[80] While the POWER Coalition supports the Commission's objective of developing a more efficient pole attachment complaint process, this objective should not be met at the expense of fairness to both parties. To that end, the POWER Coalition recommends that any shot clock for rate complaints be applicable only from the point in the proceedings at which the complaint is fully briefed, and discovery is complete.

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78 In *Verizon Virginia et al.*, Verizon filed its Complaint on August 4, 2015, and its Reply on February 9, 2016. During the five-month

79 In *Verizon Virginia et al.*, Verizon filed its Complaint on August 4, 2015, and its Reply on February 9, 2016. In the same five-month period, Verizon also propounded on Dominion, and Dominion responded to written discovery requests.

80 *See Verizon Virginia LLC and Verizon South Inc. v. Virginia Electric and Power Company d/b/a Dominion Virginia Power*, Docket No.15-190, File No. EB-15-MD-006 (Jun. 1, 2017). The parties participated in the Enforcement Bureau's mediation process for a period of four months, beginning on June 21, 2016, through November 17, 2016.

V. THE COMMISSION SHOULD NOT MODIFY ITS CURRENT APPLICATION OF THE TELECOM RATE FOR THE BENEFIT OF INCUMBENT LECS.

The Pole Attachments Act directs the Commission to develop just and reasonable rates for two separate and distinct classifications of pole attachments: first, any *pole attachment* used by a cable television system solely to provide cable service, and second, any *pole attachment* used to provide telecommunications service.[81] Although the space apportioned to an individual attachment may be varied in accordance with the principles of 47 U.S.C. § 224(e), this does not modify the statute's clear mandate that one charge be assessed per each individual attachment on the pole. If Congress intended instead that pole owners impose a blanket pole license fee, surely the Act would refer to "poles", and not to "attachments." But for avoidance of any doubt, Senate Report 95-580 confirms that the Pole Attachments Act assigned to cable television systems one foot of pole space, in which one attachment could be installed (inclusive of equipment and clearance), and for which the attacher would pay one fee based on the attacher's proportionate share of the total pole costs, in exactly the same proportion that its attachment and attendant clearances take up usable space.[82] The Commission reaffirmed this presumption in each of its relevant rules and orders since 1979,[83] and then extended the same presumption to telecommunications service attachments following its implementation of the Telecommunications Act of 1996.[84] Moreover, at the demand

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81 47 U.S.C. § 224(d)(3).

82 S. Rep. No. 95-580, 95th Cong., 1st Sess. at 21 (1977).

83 47 C.F.R. § 1.1409(e) (setting forth rate formulas for "*attachments* to poles")(emphasis added); s*ee also Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78–144, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, ¶ 24 (1979)("Second Report and Order"). .

84 2011 Telecom Order, ¶ 84.

of incumbent LECs, the Commission not only maintained this presumption, but also declared that one foot is the *minimum* space that could be occupied by any attachment.[85]

Consistent with the so-called "one foot presumption," it is the common practice of electric utility pole owners to license pole space at one-foot increments, and for each increment, to permit one linear attachment.[86] An annual fee is then is assessed for each permitted attachment, at the rate calculated in accordance with the applicable rate formula.[87] No cable or telecommunications service provider subject to Section 224 ever disputed this application of the Commission-ordered pole attachment rate framework. However, confronted with the prospect of accruing annual fees on each of multiple attachments now maintained on joint use poles, certain incumbent LECs urge the Commission to alter its present interpretation of the statute, and instead to order for *all* attachers identical "per-pole" attachment rates.[88]

As a matter of law, no incumbent LEC even is entitled to demand modifications to Section 224 rates, or the manner in which such rates are applied. Because the rate formulas ordered under Section 224(d)-(e) do not bind the Commission's review of rates charged to any incumbent LEC,[89] it follows that all incumbent LECs would lack standing to dispute the Commission's interpretation of those subsections of the statute.[90] Moreover, the proposed application of Section 224 rates per-pole sharply contradicts the Commission's stated objective of ensuring competitively neutral rates

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85 2011 Telecom Order, ¶ 88 [Also cite to current Bell construction standards manual, if possible. If the current Bell standard requires 12", it would be impossible for the ILECs to maintain multiple attachments in one foot of pole space, as they claim.]

86 In cases of wireless attachments, the one-foot presumption often is rebutted.

87 47 C.F.R. § 1.1409(e).

88 *See* Initial Comments of AT&T Services, Inc. 21-22; Initial Comments of Frontier Communications Corporation 7-9. *See also Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company and CTSI, LLC d/b/a Frontier Communications CTSI Company v. UGI Utilities, Inc.*, Reply Brief at 27-28, Docket No. 14-217, File No. EB-14-MD-007 (Sep. 15, 2014).

89 2011 Pole Attachment Order, ¶ 217.

90 *See e.g.*, *North American Aviation Properties v. National Transportation Safety Board*, 94 F.3d 1029, 1030 (6th Cir.1996); *United States v. Al–Talib*, 55 F.3d 923, 930 (4th Cir.1995). *See also Ala. Power Co. v. FCC*, 311 F.3d 1357, 1366-67 (11th Cir.2002).

for comparable service providers.[91] Each member of the POWER Coalition now operates pursuant to at least one joint use agreement that provides its incumbent LEC counterpart reserved space on the pole in excess of one foot, and at the same time, enables that incumbent LEC to install multiple new attachments without to need to obtain additional permits.[92] Therefore, if such incumbent LEC previously installed six (6) attachments in its reserved space pursuant to the terms of its joint use agreement,[93] the proposed per-pole rate covering *all* of those attachments would be just marginally higher than the rate applicable to one single attachment by the incumbent LEC's competitor under Section 224(e). Even if the Commission were now to revise its application of Section 224 rates as certain incumbent LECs propose, the prevailing lack of available space on most poles would in effect preclude any competitive service provider from ever achieving the same cost structure that current and former joint users enjoy.

The ILEC commenters that support an application of Section 224 attachment rates per-pole complain that the alternative approach would *increase* attachment rates for ILECs that transition from their historic joint use agreements.[94] This result is inadvertent, but not anomalous. The Pole Attachments Act was not intended to protect ILECs, or to place any limitation on the rates that any joint infrastructure owner is charged to attach to poles.[95] Rather, its drafters envisioned that cable television service providers would attach no more than one strand to any single utility pole, and in turn, would be charged a fee for such attachment not to exceed the proportionate share of total pole costs associated with the one foot of pole space occupied by its attachment.[96] The abrupt, unlawful decision of the Commission to broaden its jurisdiction under Section 224 generated a

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91 2011 Pole Attachment Order, ¶ 217.

92 *See e.g.*, Verizon Virginia and Verizon South Complaint Exhibits 1 & 2; Verizon Florida Complaint Exhibit 1.

93 As Dominion Energy Virginia reported to the Commission in EB Docket No. 15-190, Verizon has installed up to six attachment on one single pole pursuant to its current joint use agreement.

94 Frontier at 8.

95 See 47 U.S.C. § 224(a)(5) (defining "telecommunications carrier" to exclude any incumbent local exchange carrier, as defined in Section 251(h) of the Act).

96 S. Rep. No. 95-580, 95th Cong., 1st Sess. at 21 (1977).

conundrum with respect to rates for historic joint use relationships that are not even remotely similar to any of the relationships mandated under the Pole Attachments Act. The Commission must not depart any further from the statute's intended scope at the whim of ILECs demanding to perpetuate joint use benefits, at reduced cost.

Moreover, in their initial comments, the ILECs – including Verizon, USTA, AT&T and others, do indeed specifically seek to perpetuate joint use benefits at reduced rates while manipulating the conundrum created by the Commission's inclusion in 2011 of ILECs under Section 224. First, each ILEC commenter wants the benefit of a presumptive entitlement to the new telecom rate absent the electric utility pole owner establishing that a different rate should apply. Most argue for a bright line test as to the applicable rate. While the POWER Coalition has explained that there should be no such presumption, if the Commission chooses to apply one, the bright line test for the application of a higher rate should be explicit, simple and uniform to avoid a further conundrum. That is, if the ILEC continues to receive *any* joint use benefits not enjoyed by a CLEC, such as remaining attached at the lowest point on the pole, the old telecom rate should apply. Treatment of attachments rights as being in a different category merits treatment of the rate being in a different category.

Second, despite wanting special treatment for themselves, the ILECs do not want IOUs to be entitled to reciprocal rate treatment for their attachments to ILECs' poles. The IOUs, however, must have such protection. Absent the Commission declaring that it would be unjust and unreasonable for ILECs not to provide reciprocal attachment rates to IOUs, the IOUs will be in the untenable position of having (1) the rates they charge to ILECs regulated by the FCC at the lowest possible level; (2) the rates they pay to ILECs unregulated by the FCC and subject to the ILECs' control; and, (3) an uncertain legal right as to whether they may file a complaint and seek relief at

the Commission. Therefore, if the Commission chooses to take further action to benefit ILECs, it must ensure that it provides appropriate protections for IOUs and declare that it is an unjust and unreasonable term or condition of attachment for ILECs to refuse to provide reciprocal attachment rates to IOUs.

VI. THE COMMISSION SHOULD REJECT OUT OF HAND THE AMERICAN CABLE ASSOCIATION'S "WISH LIST" FOR MASTER AGREEMENTS.

In its initial comments, the American Cable Association ("ACA") boldly requests that the Commission adopt rules intended to "dictate" critical pole attachment agreement provisions.[97] In particular, the ACA recommends that the Commission approve boilerplate terms and conditions based on various undisclosed submissions to state regulators having no jurisdiction over the members of POWER Coalition;[98] and in turn, grant every communications service provider subject to Section 224 an unconditional right to execute such terms and conditions in lieu of concluding a negotiated agreement with the pole owner.[99] The ACA's proposal would turn agreements under Section 224, and the Commission's current approach to them, on their head, effectively mandating an opt-in tariff approach in lieu of negotiated agreements. Tellingly, in support of its broad master agreement "wish list," the ACA offers nothing more than a bald claim that utility pole owners make "unreasonable demands" as conditions to pole access.[100] Absent any record evidence in specific circumstances or conditions that communications service providers are in effect denied access to poles, or suffer any palpable harms as the result of inequitable terms and conditions of attachment, the Commission should not depart from its current policies favoring negotiated pole attachment agreements.

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97 Initial Comments of the American Cable Association at 30. *See also* Initial Comments of ExteNet at 51 (demanding that the Commission adopt a model "safe harbor" pole attachment agreement that an attacher could unconditionally avail it itself of after a 60-day negotiation period).

98 *Id*. The states in which the members of the POWER Coalition operate – Florida, North Carolina, Texas, and Virginia – do not regulate pole attachments.

99 *Id*.

100 *Id*.

The Commission's preference for privately negotiated pole attachment agreements is well founded in the Pole Attachments Act, the rules, orders, and policies of the Commission, and current industry practices.[101] In fact, the Commission always has limited its own role under the Act to cases in which the parties fail to resolve their disputes without invention.[102] As recently as 2011, the Commission reaffirmed the respective duties of pole owners and attachers to negotiate in good faith terms and conditions for pole access,[103] and further, observed that in most instances parties are able to achieve a mutually acceptable agreement without the need to resort to the complaint process for relief.[104] The record now before the Commission is devoid of any evidence that pole attachment relationships have deteriorated since 2011, or that disputed agreement terms in effect have denied communications service providers timely access to poles.[105] In fact, ACA's initial comments fail to identify even a single complaint over the past six years in which the reasonableness of any executed pole attachment agreement term was questioned.

Even if executed terms and conditions were more frequently disputed, the initial comments of ACA also fail to demonstrate (or mention, for that matter) that the "sign and sue" remedy made available to all communications service providers under the current rule is not sufficient to protect attachers from an electric utility pole owner's exercise of superior bargaining power in agreement negotiations.[106] The "sign and sue" rule was drafted, and for many decades, was maintained by the Commission to moderate the precise concerns articulated in ACA's initial comments.[107] However,

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[101] 1998 Telecom Order, ¶ 11.

[102] *Id*.

[103] 2011 Pole Attachment Order, ¶ 123.

[104] *Id*.

[105] Even ACA admits that "good actor" utilities have participated in the process of negotiating equitable pole attachment terms and conditions that are consistent with Commission's goal of expanding the deployment of hihg-performance networks. Initial Comments of ACA at 29-30.

[106] *See* 47 C.F.R. § 1.1410(a).

[107] *See* 2010 Further NPRM, ¶ 104 ("The Commission adopted the sign and sue rule in recognition that utilities have monopoly power over pole access. The Commission was concerned that a utility could nullify the statutory rights of a cable system or a telecommunications carrier by making "take it or leave it demand[s] that it relinquish

ACA appears to overlook that the rule has succeeded, and continues to succeed in its purpose. In fact, as recently as 2010, the Commission noted that its "willingness to review the reasonableness of contract provisions has… served to check the utilities' abuse of their superior bargaining power and encourage them to negotiate in good faith, thus reducing the incidence of disputes."[108] In 2011, the Commission once again retained its "sign and sue" rule intact, touting its beneficial effect.[109] In consideration of current circumstances, the Commission would not be justified in any endeavor to develop master pole attachment agreement terms and conditions.

CONCLUSION

WHEREFORE, the POWER Coalition respectively requests that the Commission consider these reply comments, and take actions, or adopt rules and policies consistent with the foregoing.

Respectfully submitted,

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valuable rights under section 224 without any quid pro quo other than the ability to attach its wires on unreasonable or discriminatory terms.

[108] 2010 Further NPRM, ¶ 100.

[109] 2011 Pole Attachment Order, ¶ 123.